

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

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IN THE MATTER OF:

CASE NO. 01-53

[REDACTED]

OFFICE OF LEGAL SERVICES

VS.

APR 23 2002

GIBSON COUNTY SCHOOL SYSTEM

DIVISION OF  
SPECIAL EDUCATION

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OPINION AND FINAL ORDER

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A Due Process Hearing was held on June 29, 2000 through July 1, 2000, December 2, 2001 and December 11, 2001 before James Stephen King, Administrative Law Judge, sitting for the Tennessee Department of Education.

Procedural History

Upon requesting the Due Process Hearing, the Student identified the following issues:

1. Whether Gibson County High School ("GCHS") has refused to implement the recommendations made by Mary Lou Lane of the Star Center in her assisted technology evaluations dated September 12, 1999 made for Student.
2. As of January 5, 2000, GCHS has failed to pay for the Star Center evaluation contrary to Student's IEP dated August 26, 1999.
3. GCHS has refused to pay for classes for Student at Sylvan Learning Center to help his reading comprehension. The Student has benefitted significantly from his instruction at Sylvan, the School has failed to provide a reading comprehensive

program that is comparable to Sylvan Learning Center or in any way sufficient for the Student's need.

4. GCHS has committed numerous procedural violations by preparing IEPs which do not conform with Federal and State requirements.

5. GCHS has failed to provide sufficient tutoring for Student's needs.

On May 4, 2000, a consent order was entered which dismissed all issues pertaining to the implementation of the Star Center Evaluation report dated September 12, 1999 with the exception of the recommendation for continuing of after-school tutoring at Sylvan Learning Center.

Shortly before the due process hearing, the Student in his prehearing brief and response to Gibson County prehearing brief, stated that he no longer sought future tutoring at Sylvan Learning Center and requested that School System be ordered to pay for a Lindamood-Bell Phonemic Awareness and Reading Comprehension Program.

At the first due process hearing, the petitioner identified three issues to be decided at the hearing:

1. Whether the School System is required to reimburse the Petitioner for the costs of services obtained from Sylvan Learning Center in Jackson, Tennessee?

2. Whether the School System has committed any actionable procedural violations?

3. Whether the School System has failed to provide tutoring services designed to meet the Student's educational needs?

At the conclusion of the first due process hearing, the School was ordered to develop an IEP to assist the Student in passing the TCAP examination. The School

System met and developed an IEP. The Parent rejected the IEP and immediately enrolled the Student in a Lindamood Bell program taught by Terri Kendall.

On remand the Student has requested reimbursement for the cost of Sylvan Learning Center and the Lindamood Bell program.

### Facts

#### A. The Student

The Student is 17 years old and currently enrolled in GCHS and will begin the 12th Grade for the 2001/2002 school year.

The Student has had numerous evaluations by medical practitioners (see Exhibit 1). The professionals have diagnosed the Student with Tourett's Syndrome and dyslexia (ex 1. BD0084). Numerous IQ tests have been performed. Psychologist Kimberly Hilton performed an intelligence test (WISC-III) in 1995 and determined that the Students full scale IQ was 90 in the low average range. In 1996, the Bowling Center for Development Mental Disabilities performed the Wechsler Intelligence Scale for Children III and obtained a full scale IQ of 78 (plus/minus 4). The Student's expert, Dr. Judith Wiess obtained a score of 85 on the Woodcock Johnson test.

Testimony establishes that the Student's intellectual functioning is in the low average range.

The Student was described by all witnesses as a polite, respectful young man who generally cooperates with his teachers. The Student is involved in the regular academic curriculum as modified by his IEP and plays football.

The student attended Sylvan Learning Center located in Jackson, Tennessee beginning in the seventh grade and continuing through the ninth grade. It takes

approximately four to five hours to make the drive to Sylvan Learning Center, complete the course and return home.

#### SEVENTH GRADE

During the Student's 7th Grade School Year, the School System developed an IEP for the Student that provided one hour per day of Special Education Resource assistance in reading, math and language and ( at the Parent's request) two hours per week of after-school tutoring at Sylvan Learning Center, as well as classroom modifications and accommodations. (Ex. 1, BD 0135-BD 0138). The School System also purchased a new lap top computer for the Student and he received instruction in keyboarding skills five times per week from his teacher. Apparently the lap top computer was of little use because the Student would not bring the computer to class, stating that he had lost it or left it at home. The Student completed the 7th Grade passing all courses, earning three B's, three C's and one D.

#### EIGHTH GRADE

During the Student's 8th Grade School Year, the School System declined to offer Sylvan Learning Center. The School System did provide a total of 13 hours per week of individual tutoring to the Student. Ms. Sheila McCaslin provided one hour per day tutoring on homework assignments and computer skills. Ms. Emily Parks provided the Student with individual tutoring and homework assistance five times per week during study hall. Ms. Patty Douglas, a certified math teacher, was hired by the School System to provide three hours per week of individual tutoring in math. The mother continued to provide Sylvan Learning Center at her own expense. The Student completed the 8th Grade earning one A, two B's and four C's.

## NINTH GRADE

During the Student's 9th Grade year, the Mother continued to request that the School System provide after-school tutoring at the Sylvan Learning Center. The School System provided written notice that it was refusing to pay for Sylvan Learning Center. The School System investigated the program offered at Sylvan Learning Center. Although Sylvan Learning Center was somewhat reluctant to provide full descriptions of its program, the School System developed, based on the description of the Sylvan program, a similar program at the school. The School System purchased the Steck - Vaughn curriculum which the School System contends was comparable to the curriculum used by Sylvan Learning Center. The Student attended three tutoring sessions with the School System then stopped participating in the tutoring program. The Parent continued to provide Sylvan Learning Center tutoring at her own expense. The Student passed the 9th Grade.

## TENTH GRADE

During the 10th Grade year the School System developed a proposed IEP that offered one hour per week of after-school tutoring for Algebra I and general English with Ms. Patti Douglas, consultative assistance for biology, in addition to classroom modifications and accommodations. The Parent continued to provide tutoring on Wednesday night at Sylvan Learning Center for the Student.

## POST JULY 2000

At the conclusion of the first due process hearing, the School System was ordered to develop a summer IEP for the Student with the objective of preparing the Student to pass the TCAP. The IEP Team met and the School System proposed

summer services of at least ten hours per week spread over three days each week. (12/3/02 hearing p. 303). Robert Books, an English teacher with thirty years experience teaching English, was to provide one-to-one tutoring. (12/3/02 hearing pp. 303-305). Amanda Bell, a second year teacher in mathematics was to provide tutoring in mathematics. ( 12/3/02 hearing p. 305). The tutoring would use materials that had been used for ten to twelve years to prepare Students for the TCAP examination (12/3/02 hearing pp. 305-307)

During the meeting the Parent requested the Lindamood Bell program. The School System refused and offered services through the School System.

#### ELEVENTH GRADE

The Student received Lindamood Bell training in the Summer of 2000 at the Parent's expense and returned to the School System in the Fall of 2000. The School System provided the Student a program called Learning Block for English remediation. During the Spring semester the Student was placed in a competency class for both mathematics and language arts, forty-five minutes each day. The classes consisted primarily of drill and practice type activities that deal with both the mechanics and reading comprehension portions of the TCAP examination. (12/3/02 hearing p. 310).

The Student took the TCAP on October 30, 2000 and narrowly missed passing with scores of Math 68 and Language 67.

The School System continued tutoring the Student and he passed the Language portion of the TCAP in February 2001.

During the eleventh grade the Student passed all of his courses with grades ranging from 75 in Economics to 91 in American Government. ( Exhibit A)

## TCAP SCORES

The Student has taken the TCAP examination seven times. Tennessee requires that a student pass the math and language portions of the TCAP in order to graduate from High School. The Students scores are as follows:

Date	Grade	Math	Language	
10/26/98	9	53	59	
2/22/99	9	54	60	
10/25/99	10	50	63	
3/9/00	10	63	67	
10/30/00	11	68	67	
2/26/01	11	64	78	Passed Language
10/1/01	12	78		Passed Math

(See Exhibit A, 12/3/01 transcript)

### B. SYLVAN LEARNING CENTER

The Sylvan Learning Center is a private company which provides educational instruction to the public for a fee. It is not accredited by the state and does not receive any public funds. The instructors are not certified in special education. Sylvan Learning Center was reluctant to describe in great detail its course material. It appears that the Student was in the academic reading program. Sylvan Learning Center provides individualized instruction by its personnel to the student using its proprietary teaching materials. The students are plugged into the program based on their current functioning. Christy Glen, Sylvan's Director of Education described the method as a recipe or formula. As the student masters new skills, he or she progresses through the program.

### C. THE STAR CENTER

Mary Lou Lane is the manager of Special Services and coordinator of Mobile Services for the Star Center. She performs faculty evaluations and teaches at the University of Memphis Special Education. (Vol. 10, pg. 12)

Ms. Lane holds a Bachelor of Science in Social Services, a Masters in Teaching Special Education, a Masters in Healthcare Administration and will have a Doctorate in Special Education once she defends her dissertation. She has worked in the Memphis City Schools and the Haywood County Schools for 8 years as a special education teacher, prior to coming to work for the Star Center. She has also worked as a medical technologist at the University of Tennessee, Memphis and ran the diagnostic labs for Baptist Memorial Hospital. (Vol. 10, pgs. 12-15)

Ms. Lane authored the Star Center Reports of April, 1995 and September 12, 1999. The 1999 Star Center Report recommended:

1. A computer equipped with DragonDictate Naturally Speaking Preferred 4.0 and a tape recorder for recording class;
2. A talking calculator;
3. Instruction in information organization, test-taking skills and study habits;
4. A spelling and grammar checking software program. She also recommended a hand-held spelling device such as the Word Power English Vocabulary Builder;
5. Continued tutoring with Sylvan Learning Center or as an alternative the PACE program at the University of Tennessee at Martin. If the



Student could not attend either program, Ms. Lane recommended a tutor. ( See Petitioners Collective Exhibit 3 and Vol. 10 pg. 32).

The School System acquiesced to all the recommendations except for continued tutoring at Sylvan Learning Center.

Ms. Lane testified that the Parent contacted her after she completed her report and requested that she change the report with regards to the description of the tutoring. (Vol. 10 p. 33). Ms. Lane refused the request. She testified that tutoring at Sylvan was not particularly important but the important point is that the Student needed tutoring. ( Vol. 10, p. 33).

Ms. Lane testified that she had worked with Mr. Tucker on previous occasion and that he had been cooperative. (Vol. 10, pg. 53). She further testified that he had not reacted negatively to the cost of any of the services or technologies her Center had recommended. (Vol. 10, pg. 55).

D. JUDITH WEISS, PH.D.

The parent had the Student evaluated by Dr. Judith Weiss. Dr. Weiss is a Licensed Clinical Psychologist with a Ph.D in Psychology from Duke University. (Vol. 1, pp 33- 34 and Petitioners Collective Exhibit 3). In addition she is a consultant for Tennessee Protection and Advocacy, Inc. and runs an internet consulting business, DRJUDUTH.COM, where she reviews school system psychological reports for parents. Dr. Weiss has testified in several due process hearings on behalf of parents. (Vol. 1. p. 39). On void dire, the School System brought out that in due process hearing number 90-31 the Judge refused to Order that the school system reimburse Dr. Weiss's fee

because she altered her report. (Vol. 1, pp. 40-44). Dr. Weiss's demeanor is well meaning and she is definitely and an advocate for her client. At times her philosophical orientation creates a bias toward parents the position, as opposed to a neutral and detached opinion.

On April 12, 2000, Dr. Weiss conducted a neuropsychological evaluation of the student. ( Petitioner's Exhibit 3). Dr. Weiss determined that the Student was dyslexic. She reported that administration of the Lindamood Auditory Conceptualization Test (the "LAC" test) evidenced that the Student lacked phonemic awareness. Id. Phonemic awareness refers to the ability to identify, count and sequence the sounds within a syllable. Id. Dr. Weiss further testified that the student's poor performance on the Word Attack test of the Woodcock Johnson Revised Test of Achievement evidenced the students lack of phonemic awareness but that the LAC test was "the" test for phonemic awareness. The Word Attack test measures a student ability to decode nonsense words.

Dr. Weiss recommended that the Student enroll in the Lindamood-Bell program and provided with instruction in the Lindamood-Bell Auditory Discrimination in Depth. (This is also referred to as the LiPs program. ) The LiPs program uses a series of drills to teach the child 44 phonemes and the 43 rules used in the English language.

Immediately after the first due process hearing the Parent enrolled the Student in the Lindamood Bell program taught by Terri Kendall.

Subsequent to the Students completion of the program Dr. Weiss retested the Student's academic achievement using the Woodcock-Johnson Test of Achievement-Revised. Based on her testing, Dr. Weiss opined that the Student had mastered

phonemic awareness and was reading at grade level. She testified that the Student had improved on standard deviation (15 points) which was remarkable progress. For comparison purposes the Students before and after scores are:

<u>Test</u>	<u>Date</u>	<u>Grade Score</u>	<u>Age Score</u>	<u>Percentile</u>	<u>Standard Score</u>
Passage Comprehension.	4/12	6.6	11-8	20	88
Passage Comprehension.	7/27	12.0	17-10	58	103
Word Attack	4/12	4.1	9-4	19	87
Word Attack	7/27	11.9	19	55	102

E     NANCY MATHER, PH.D.

Nancy Mather, Ph.D. appeared on behalf of the School System. Dr. Mather has a Master's Degree and a Ph. D in Special Education. She is currently employed as an Associate Professor at the University of Arizona. Dr. Mather has worked collaboratively with Dr. Woodcock for fifteen years. She wrote the manuals for the Woodcock-Johnson Revised and coauthored the Woodcock Johnson III. Dr. Mather has published articles and served as a consulting editor for peer review journals. ( Mather p 5-7). Dr. Mather has testified in two previous due process hearings. On both occasions she testified for the parent.

The Parent refused to allow Dr. Mather access to the Students complete educational record. (12/3/01 hearing, Exhibit E), ( Mather p. 15). The only records she released were Dr. Weiss's evaluation, two sub-test from the Woodcock-Johnson, revised and Dr. Weiss's report indicating the Student's progress and the Students TCAP scores. Id.

Dr. Mather testified that it was not clear from the test scores, whether or not he has a learning disability or not. ( Mather p.16). Typically with a learning disability there is a discrepancy between potential and achievement. Id. For example, an individual will have ability scores on an intelligence test or oral language abilities test that are higher than their performance. Id. Dr. Mather opined that the Student abilities are in line with his performance. ( Mather p. 17).

Dr. Mather opined that the Student did not suffer from a lack of phonemic awareness. ( Mather p. 27). She diagnosed the Student with a phoneme-grapheme deficit. Phonemic awareness is the ability to manipulate sounds orally.<sup>1</sup> ( Mather p. 27). Phoneme-grapheme knowledge is a lack of letter sound correspondence. (Mather pp. 27-28). The Student is not automatic with letter-sound correspondence. (Mather p. 31).

The Word Attack test of the Woodcock-Johnson Revised is a measure of the ability to pronounce nonsense words. Word Attack, as the ability develops, has a steep growth curve. It develops fast and plateaus starting around the fifth or sixth grade level and most people do not improve much thereafter. ( Mather p. 29). The Word Attack test shows that the Student is functioning on the fourth grade level ( Mather p. 27). The student could not score at the fourth grade level unless he had phonemic awareness. (Mather p. 28). The Students basic reading skills are in line with his tested abilities. (Mather p. 29). He is one standard deviation ( 15 points) below the mean which is just the same as his verbal IQ on the WAIS - III of 85.

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<sup>1</sup> Compare to Dr. Weiss' definition of Phonemic Awareness which is the ability to identify, count and sequence the sounds within a syllable.

Deficits in phoneme-grapheme knowledge can be addressed by many programs. (Mather p. 31). Appropriate programs are the Wilson Reading System, Orton-Gillingham, Slingerland, Herman Method, Project Read, Recipe for Reading, Phonic Remedial Reading Drills and Lindamood-Bell. ( Mather p. 31). It is also possible to remediate the Students deficits without the use of brand name methodology. (Mather p. 32).

Dr. Mather reviewed Dr. Weiss' test scores and admitted that she had no reason to disagree with Dr. Weiss administration of the test or the scores received. ( Mather p. 32). Dr. Mather did point out that the Woodcock-Johnson Revised manual, which she wrote, requires that test are to be interpreted at the cluster level so that at least two tests are measuring some aspects of an ability are administered. ( Mather pp. 32-33). Dr. Mather further disagreed that the 12 grade score on the Passage Comprehension test meant that the Student was reading on the 12<sup>th</sup> grade level. ( Mather p. 35). The Passage Comprehension only measures a narrow aspect of reading ability and additional information is needed to determine the Student reading ability. Id. Dr. Mather stated that Lindamood Bell could help improve the Students test scores. Id.

### CONCLUSIONS OF LAW

The Individuals With Disability Act ("IDEA") and State law requires that the School System provide a free, appropriate public education ("FAPE") to the Student by developing an IEP that is reasonably calculated to confer educational benefit to him. See, Bd. of Educ. of the Hendrick Hudson School Dist. v Rowley, 458 U.S. 176 (1982). School systems are not required to maximize the educational benefit or guarantee any specific level of academic performance. Rowley @ 197. In analyzing the language of

the Tennessee State statute the Federal Court in Doe v Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993), stated that schools are not required to maximize a Student's potential.

The Doe court has developed a colorful metaphor to describe the FAPE standard:

The Act requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student . . . [T]he [school district] is not required to provide a Cadillac . . .

Doe v. Tullahoma City Sch., 9 F.3d 455 (6th Cir. 1993)

The task at hand is to determine if the Student has received a serviceable Chevrolet, if so the School System has complied with the Act.

The U.S. Supreme Court has developed a two-prong test for determining the appropriateness of the proposed IEP. Rowley, supra. First the IEP must be substantively appropriate by offering goals and objectives that are reasonably calculated to provide educational benefit to the Student and second, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP, to receive notification and explanation of their rights.

**A. Reimbursement for Sylvan Learning Center**

The primary dispute between the School System and the Parent for several years has been the provision of Sylvan Learning Center tutoring to the Student. The School System provided tutoring at the Sylvan Learning Center during the Student's 7th grade school year. The Parent has provided Sylvan Learning Center in the years following; however, they have requested that the School System provide such tutoring. The Parent is now requesting reimbursement for Sylvan Learning Center for the years

that the Parent has provided the service. Surprisingly, the Parent is not requesting future Sylvan Learning Center since the Parent's own expert, Dr. Judith Weiss, Ph.D., testified that the Sylvan Learning Center did not provide the type of program the Student needed nor was it ever the type of program the Student needed.

The School System and the Parent are both in agreement on one issue that the Student requires tutoring, in addition to his regular academic program. Pursuant to the Student's IEP, the School System has provided tutoring services to the Student with its personnel, except for one year, when it paid for Sylvan Learning Center's tutoring program. The Parent contends that the School System failed to provide a reading comprehension program that is comparable to Sylvan Learning Center or in any way sufficient to meet the Student's need. The Parent contends that the School System officials unilaterally denied services of Sylvan Learning Center and controlled the IEP team process in such a manner that the IEP team would not provide Sylvan Learning Center because of the cost of the services. The School System contends that it is not required to provide tutoring through Sylvan because it can provide tutoring with school personnel and that the Student does not need the type instruction provided at Sylvan.

In the Student's 9th grade year, in an effort to accommodate the mother's request for Sylvan Learning Center, the School System attempted to set up a program similar to Sylvan Learning Center. The School System personnel investigated the program at Sylvan; however, Sylvan Learning Center considers its program to be copyrighted and provided little information regarding the program. In fact, even during the depositions taken in this proceeding, Sylvan Learning Center refused to produce their materials. From the information the School System was able to obtain, the School

System purchased the Steck-Vaughn curriculum which it believed to be similar to the materials used by Sylvan Learning Center. The School System assigned, Sheila O'Briant, to provide the tutoring. The Student testified that Mr. Lynn Tucker, the Special Education Director, said that if the school tutoring did not work out he could go to Sylvan. The Student stopped attending the tutoring after three sessions. The Student testified that he quit the tutoring program because he was frustrated that the Steck - Vaughn material was for the first grade level and he reads at the sixth grade level. However, the records from the purchase of the Steck - Vaughn material and testimony of Mrs. O'Briant establish that the materials were for the 5th and 6th grade level. The School System contacted the Parent about the Students attendance and was told that the Parent could not get the Student to attend. The Student has given no reasonable basis for not attending the School systems tutoring program. Perhaps he thought by not attending the School Systems program the program was not "working out" and the School System would pay for Sylvan. The School System provided additional tutoring to the Student comparable to Sylvan Learning Center. The Student chose not to participate in the School Systems program.

The School System is not required to contract with a private contractor to provide services to its students if it can provide the services with its own personnel. The IDEA provides:

[T]his part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school of facility if that agency made a free appropriate



public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C).

In this case, the School System was justified in offering the tutoring services through its personnel rather than contracting with Sylvan Learning Center. The choice is highlighted by the fact that Sylvan Learning Center does not disclose its teaching methods, did not have special education certified teachers on staff and the fact that sending the Student to an educational location that requires a two hour round trip drive from his home would have violated the least restrictive environment ( "LRE" ) requirements of the IDEA.

Therefore, I find that the School System acted appropriately in refusing to pay for Sylvan Learning Center because instruction at Sylvan Learning Center would violate the LRE requirements, the School System can provide similar services with its personnel and the Parents expert said the Student did not require Sylvan. Furthermore, the Student was not justified in refusing to participate in the School Systems tutoring program. The School System will not be required to reimburse the Parent for Sylvan Learning Center for the reasons cited above and because the Student refused to participate in the School Systems tutoring program.

**B. Procedural Violations**

The Parent has asserted that the School System committed procedural violations in developing and implementing the IEP. The Parent contends that Mr. Tucker the Special Education Director controlled the IEP Team and that he refused to consider Sylvan because of cost. The Parent has also pointed out that the School

System did not always record the Students progress on the goals' sheet of the Students IEP.

Procedural violations must be analyzed in view of whether any actual harm results. The Sixth Circuit has ruled those procedural violations, which do not cause a corresponding substantive violation, do not violate IDEA. Where the parents are afforded the opportunity to participate in the IEP process, minor or technical procedural violations of the Act, have no impact. See, Doe V. Defendant I, 898 F.2d 1186 (6th Cir. 1990)

Based upon the testimony, there appears to be an undercurrent that certain services that are expensive are not suggested by the school system personnel at IEP Team meetings. Particularly disturbing was the testimony by Ms. Wanda Partee that she knew not to make certain recommendations in IEP team meetings because they "won't fly." Clearly the School System is not required to hire a private contractor to provide services when it can provide the services with its' personnel. The problem in this case is that the undercurrent that the school will not consider expensive services is that even when the School System was providing appropriate services, it creates the perception to the Parent that the reason the Student is not receiving the services the Parent desires is because of funding. This creates distrust between the Parent and the School System personnel and greatly inhibits the working relationship between the School System and the Student. The perception problem is particularly troublesome when the requested service is something the School System is not required to provide under IDEA, i.e., a private contractor to provide services that the School System can provide with its personnel. In this case the School System had provided Sylvan in the

past, offered tutoring through its personnel and was not legally obligated to provide Sylvan, therefore, no harm has resulted in this case from any perceived or actual reluctance on the part of the School System to fund expensive programs.

The failure to document progress on the goal sheets did not result in any harm that would require the School System to pay for the Sylvan Learning Center. Testimony established that school personnel were fully aware of the Students level of progress based the constant interaction between the school personnel and the Student. Furthermore, the Student was in the regular education program where he took tests and handed in homework which kept his teachers apprized of his progress. Therefore, the claim for compensatory education because of alleged procedural violations is denied.

C. Lindamood Bell methodology

The United States Supreme Court in Rowley opined that the “IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Rowley at 203-204.

The Student has a phoneme-grapheme deficiency. Dr. Mather testified that deficits in phoneme-grapheme knowledge can be addressed by many programs. She listed appropriate programs as the Wilson Reading System, Orton-Gillingham, Slingerland, Herman Method, Project Read, Recipe for Reading, Phonic Remedial Reading Drills and Lindamood-Bell. She also testified that it is possible to address the Students deficits without the use of brand name methodology.

In the Parent's pre-hearing brief, filed shortly before the first due process hearing, the Parent indicated that she was requesting Lindamood-Bell training for the Student to address the Student's alleged lack of phonemic awareness.

The issue to be addressed whether the school system offered a program that addressed the phoneme grapheme deficit that was reasonably calculated to provide educational benefit?

The Student's phoneme grapheme deficit affects the Student's ability to read. If the Student cannot read, he cannot comprehend the materials being presented by his instructors. In order to graduate the Student must pass the TCAP examination. The Student's inability to read affects not only the Student's performance in the Language portion of the TCAP, but also, the Math portion which requires the Student to read the problems. The Student's phoneme grapheme deficit can be improved with appropriate instruction. Therefore, in order for the IEP to be reasonably calculated to confer educational benefit to the Student it must provide for appropriate instruction to address the Student's phoneme grapheme deficit.

The Student was first identified as having a phoneme deficit one week before the first due process hearing. The Student had numerous evaluations which did not identify the problem. It was only within the context of these proceedings that the problem was first identified. Even then, the two experts, Dr. Weiss and Dr. Mather, did not agree on a diagnosis of the Student's phonemic problem. Dr. Weiss found that the Student suffered from a lack of phonemic awareness and Dr. Mather found that the Student suffered from a phoneme grapheme deficit. Therefore, the School Systems previous

IEP's were appropriate based on the information the School System had available, but the phoneme grapheme deficit had not been addressed.

Dr. Mather testified that a phoneme grapheme deficit could be addressed by use of a "name brand" program or without the use of a name brand program. The School System refused to provide Lindamood Bell the brand name methodology requested by the Parent.

The Lindamood-Bell program is essentially an educational methodology. The choice of educational methodology is a matter of discretion within the authority of the school personnel. The Supreme Court stated in the Rowley case that "the primary responsibility for formulating the education to be afforded a handicapped Student and for choosing the educational methodology most suitable to the Student's needs, was left by the Act to State and Local agencies in cooperation with the parents or guardians of the Student." Rowley, supra 458 U.S. @ 207. One of the leading cases on methodology is Lachman v Illinois State Board of Education, 852 F. 2d 290 (7th Cir. 1988), cert . denied, 488 U.S. 925 (1988). Lachman involved a dispute between parents and a school district over how best to educate a deaf child. The parents favored a "cued speech" methodology that trained the child to understand spoken language. The district recommended a "total communication" approach in which the child would have relied primarily on sign language. The court found that the district's proposed placement using total communication "satisfied IDEA"; therefore, the court ruled that the parents could not force the school district to adopt what they perceived to be an even more efficient educational program. The court observed "once it is shown

that the Acts requirements have been met, the question of methodology is for resolution by the responsible authority.”

The Sixth Circuit, applying Lachman, adopted the view that the parents are not entitled to dictate educational methodology or to compel a school district to supply a specific program for a disabled child. Rather, the court held that school districts have discretion over methodology decisions. Tucker v Calloway Bd. of Educ., 136 F. 3d 495 (6th Cir. 1998).

The Parent cannot dictate the educational methodology used by the School System. However, School System must provide some educational services to address the Students phoneme grapheme deficit.

After the first due process hearing the School System convened an IEP Team meeting to develop an IEP for the Summer of 2000 and the following year. The Parent requested Lindamood-Bell, but her request was denied. The IEP proposed by the School System provided one to one tutoring in Math and English. The materials proposed by the School System were TCAP preparatory materials. It is unclear if the instruction offered to the Student would address a phoneme grapheme deficit. The 2000/2001 IEP, introduced as Exhibit C, does not reflect that a phoneme grapheme deficit was to be addressed.

The School System has provided or offered to provide numerous tutors, purchased the Steck-Vaughn reading materials for the Student and provided tutoring in the TCAP subjects. The services offered to the Student were a necessary component of the Students education. However, the services offered to the Student did not address the phoneme grapheme deficit. Except for not addressing the phoneme

grapheme deficit, the services provided to the Student provided FAPE and complied with the requirements of Rowley, supra. The necessary instruction to address the phoneme grapheme deficit was supplied by the Parent. The Parent testified that Terri Kendall charged \$3,400.00 to provide the Lindamood-Bell therapy and that she incurred \$1,600.00 motel expenses. She further testified that there were other expenses incurred but there was no testimony regarding the amount of such expense. Parent further testified that she had lost income of \$12,000.00 while attending the Lindamood-Bell therapy with the Student. The Parent is entitled to reimbursement for the cost of providing Lindamood-Bell instruction.

The Parent has proven and shall recover \$3,400.00 for the cost of the Lindamood-Bell therapy for the Student plus \$1,600.00 in travel expenses.

**D. Failure to implement the Star Center report.**

A consent order was entered on May 4, 2000 implementing the Star Centers report, except for the recommendation for Sylvan Learning Center. The Student subsequently claimed that the School System failed to furnish the assistive devices designated by Star Center report. The proof shows that the School System purchased the equipment and notified the Student on several occasions that the equipment was available. The Student did not avail himself to pick up the equipment. The Administrative Law Judge finds that the School System complied with the consent order. Therefore, this issue is without merit and is dismissed.

**ORDER**

It is therefore ordered, adjudged and decreed that:

(1) the School System shall reimburse the Parent the sum of \$5,000.00 as reimbursement for providing Lindamood-Bell therapy;

(2) all remaining issues asserted by the Student are dismissed; and

(2) the Student is the prevailing party on the issue of Lindamood-Bell therapy and the School System is the prevailing party on the all remaining issues.

This decision shall be binding upon both parties unless the decision is appealed. Any party disagreeing with this decision may appeal to the Chancery Court of Davidson County, Tennessee or seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within 60



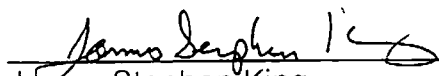
days from the date of entry of a final order in a non-reimbursement case or 3 years involving educational costs and expenses. In the appropriate cases, the reviewing court may order that the final order be stayed pending appeal.

  
JAMES STEPHEN KING  
ADMINISTRATIVE LAW JUDGE

DATED: April 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been sent by postage prepaid mail, this the 17<sup>th</sup> day of April, 2002.

  
James Stephen King

## ATTACHMENT

### ATTORNEY FOR PARENTS:

Suzanne Michelle, Esquire  
2416 21st Avenue S.  
P.O. Box 121257  
Nashville, Tennessee 37212  
(615) 298-1080

### ATTORNEY FOR SCHOOL SYSTEM:

Melinda Baird  
300 Montvue Road  
Suite D  
Knoxville, Tennessee 37919  
(865) 539-9964

### ADMINISTRATIVE LAW JUDGE:

James Stephen King  
1661 International Place Drive, #300  
Memphis, TN 38120  
(901) 767-1234  
(901) 767-4010 Fax

Division of Special Education  
Tennessee State Department of Education  
8th Floor, Gateway Plaza  
710 James Robertson Parkway  
Nashville, TN 37243-0380